No. 82-1678

Office Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

Spring Term, 1983

ERIN FULTON, et al.,

Petitioners,

v.

PLUMBERS AND STEAMFITTERS
LOCAL 598, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OPPOSING CERTIORARI

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QUESTION PRESENTED

(Counterstatement)

Taft Hartley §303 created a claim for "damages" in the event of injury to "business or property" suffered "by reason of" a jurisdictional dispute between unions. The question is whether Section 303 encompasses a suit by employees for wages lost in the course of a jurisdictional dispute.

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STATEMENT OF THE CASE

The statement set forth by Petitioners follows largely the statement set forth by the court of appeals, construing the facts in favor of Petitioners, 695 F.2d at 403, n.3. The Ninth Circuit affirmed the district court's dismissal for lack of standing, finding Petitioner employees were not injured "by reason of" an alleged Section 8(b)(4) violation. The court below held that the wage loss was not a "necessary and integral" consequence of the violation and was "not reflective of Congress' core concerns in prohibiting" jurisdictional strikes. 695 F.2d at 407-408.

ARGUMENT WHY CERTIORARI SHOULD BE DENIED

A. The Court Below Correctly Held That Petitioner Employees Were Not Injured "By Reason Of" The Jurisdictional Dispute.

Taft Hartley §303, 29 U.S.C. §187, created a federal claim for "damages" upon proof of injury to "business or property" suffered "by reason of" a jurisdictional dispute or secondary boycott. The court below held that employees who lose wages are not injured "by reason of" an alleged section 303 violation. Taft-Hartley §303 and the Clayton Act §4, 15 U.S.C. §15, contain the standing requirement that injury be suffered "by reason of" the statutory violation. Thus, the Court below correctly used the two-prong test set forth in Blue Shield of Virginia v. McCready, ___U.S.___, 73 L.Ed.2d 149 (1982).

The McCready test looks to (1) the nexus between the alleged statutory violation and the harm alleged and (2) the relationship of the injury to the injuries "about which Congress was likely to have been concerned in making defendant's

conduct unlawful and in providing a private remedy," 73 L.Ed.2d at 160.

There is no nexus between the alleged jurisdictional activity and the Petitioners' wage loss. The object of a jurisdictional strike is to require an employer to reassign certain work, not lay off workers. "This consequence was not a 'necessary and integral' aspect" of the alleged violation, and "the injury alleged is too remote" to warrant Section 303 standing, 695 F.2d at 407.

The holding below is consistent with McCready, where standing was present because the harm to health plan subscribers by withholding claim payments was foreseen and was a "necessary step" in effecting the ends of the antitrust violation. It is a foreseeable and "necessary step" in a jurisdictional strike that the strikers cease work. But it is neither foreseeable nor a "necessary

step" that co-workers be laid off in order to effect a reassignment of certain work functions from one craft to another craft. The court below was in good company when it "denied standing to employees with merely derivative injuries." Associated General Contractors v. Carpenters, 74 L.Ed.2d 723, 740 n. 46 (1983).

B. Legislative History and Federal Labor Policy Militate Against Creating A Claim In Favor Of Employees Asserting Wage Loss Incidental To A Jurisdictional Strike.

The second prong of the McCready standing test looks to the relationship of the injury alleged to the type contemplated by Congress when it created the claim. This inquiry is appropriate in all federal question cases. As noted by the court below, Congress through Section 303 intended to protect small businessmen and

farmers, not employees. 695 F.2d at 407-408, citing e.g. S. Rep. No. 105 on S. 1126, supplemental views, 80th Cong. 1st Sess. 54 (1947), reprinted in 1 NLRB Legislative History of the LMRA, 1947 P. 460. There is no indication in the legislative history that incidental injury to the employees of such employers falls within Congressional intendment.

Petitioners seek class action damages for about 1,800 workers who were earning $150.00 per day. Damage awards of this magnitude would, as noted below, render unions "incapable of effective representation" and "inhibit legitimate union activity." 695 F.2d at 408. When a new damage theory is tendered the potential for "impairing the effectiveness of unions as collective-bargaining agents" must be weighed. Electrical Workers v. Foust, 442 U.S. 42, 50-51 (1979).

Petitioners are not without a remedy. Anyone can file an unfair labor practice charge. See: NLRB Rule 102.9 and NLRB v. Indiana & Michigan Elec. Co., 318 U.S. 9, 17-18 (1943). Taft Hartley 10(k), 29 U.S.C. § 160 (k), provides for expedited administrative proceedings in jurisdictional disputes. The NLRB routinely seeks and obtains injunctive relief in such cases. 29 U.S.C. §160(1). A suitor who fails to seek an available remedy suffers no wrong when the courts refuse to create a new cause of action for his benefit.

C. The Decision Below Does Not Conflict With The Wells Opinion Of The Sixth Circuit. The Standing Issue Presented In This Case Was Not Raised In The Wells Case.

Petitioners assert that the decision below conflicts with the decision of the Sixth Circuit in Wells v. International

Union of Operating Engineers, Local 181, 303 F.2d 73 (6th Cir. 1962). However, the issue of employee standing to sue under Section 303, decided by the court below, was not presented in Wells. In Wells the union asserted insufficient jurisdictional amounts. The union brief presented the following issue for review (p. 6):*

> Whether the Plaintiffs-Appellees other than Tye & Wells were properly before the Court as to jurisdictional amounts. (Emphasis added)

The union's argument in Wells was consistent with its statement of issue. At page 15 of the union brief it was said:

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* Copies of the appellant's and appellees' briefs in Wells have been forwarded under separate cover to the Clerk of this Court and counsel for Petitioners.

> In this case jurisdiction of the Court would not be obtained by adding the individual Plaintiff-Appellees....since none of their individual claims were sufficient in amount to grant jurisdiction to the Court under its rules and the statutes appertaining thereto.

The Wells plaintiff-employees replied at page 27 of their appellate brief:

> As the statute plainly states, jurisdiction is conferred without respect to the amount in controversy. Whoever is injured may sue, whether primary employer, secondary employer, or employee.

Rejecting the union's jurisdictional argument the Sixth Circuit wrote (303 F.2d at 75):

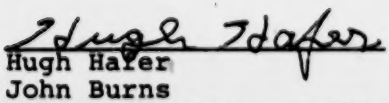
> Clearly jurisdiction is conferred to permit whoever is injured to sue without respect to the amount in controversy.

Put simply the standing issue, decided below, was not presented in Wells. Since the Wells court did not decide a contested standing issue, there is no conflict between Wells and the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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